It follows, therefore, that the plaintiffs by acquiring a reputation in that way acquired a quasi-proprietary right to the exclusive use of their particular get-up in relation to sweets. In my opinion, even if the vast majority of such customers as did not speak English referred to *HACKS* sweets as "red-paper cough sweets" that could not give the plaintiffs a monopoly as regards the colour of their wrappers.

The second question to consider is whether the defendants invaded the quasi-proprietary right of the plaintiffs by using a similar get-up in relation to the defendants' sweets and thereby causing a probability of deception in the minds of purchasers. My view is that by imitating the orange colour of the wrappers of the plaintiffs' sweets the defendants did not invade the quasi-proprietary right of the plaintiffs. As was said by Russel J. in *Dunhill* v. *Bartlett & Bickley* [6]:

"Apart from monopolies conferred by patents, and apart from protection afforded by registration, it is open to anyone to adopt the ideas or devices of his neighbour and apply them to his own goods provided he clearly distinguishes his goods from those of his neighbour."

Here I must refer to the words of Lord Halsbury in *Schweppes Ltd.* v. *Gibbens* [2]:

"The whole question in these cases is whether the thing — taken in its entirety, looking at the whole thing — is such that in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived."

And I must also cite the following passage from the judgment of Romer L.J. in *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.* [7]:

"It seems to be a sort of popular notion . . . that in considering whether customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods . . ."

It is pertinent to add here what was said by Lord Macnaghten in the same case when it went before the House of Lords [8]:

"I entirely agree with the judgments of the Court of Appeal, and particularly with the very instructive judgment of Lord Justice Romer."

In my view, if a *HACKS* sweet is placed side by side with a PECTO sweet and the wrappers are looked at fairly, no person with reasonable apprehension and with proper eyesight could be deceived. Furthermore, a customer who knows the distinguishing characteristics of the plaintiffs' sweets, but does not see the plaintiffs' sweets and the defendants' sweets placed side by side and trusts to his memory, is not likely to be deceived. The difference is obvious and is not concealed. The defendants state on their wrappers in the clearest manner that they are selling *PECTO* sweets.

It is conceded by counsel for the plaintiffs that retail dealers were not deceived by the similarity of the defendants' wrappers to the plaintiffs' wrappers as regards colour. It is contended, however, that the defendants' get-up enables retail dealers to deceive the ultimate purchasers. Abdul Wahid, a salesman employed by the plaintiffs' agents, testified that on the 15th and 16th October, 1958, he visited a number of Chinese retail dealers; that six of them displayed for sale both *HACKS* and *PECTO* sweets kept in the same glass jar; and that at each of the shops he asked for a pound of *HACKS* sweets in Malay, referring to them by their trade name *HACKS*, and was given a pound of *HACKS* and *PECTO* sweets mixed. In my opinion, this evidence does not prove that the defendants' get-up enables retail dealers to deceive the ultimate purchasers. I consider that retail dealers who mix up defendants' sweets and plaintiffs' sweets in a glass jar are not treating the defendants' sweets fairly and are not showing them fairly to the ultimate purchasers. In my judgment, to supply *HACKS* sweets and *PECTO* sweets mixed when asked for *HACKS* is clearly deception on the part of retail dealers for which the defendants are not responsible.

Choo Kok Cheng and Gan Chin Choo were called by the plaintiffs to give evidence as to other alleged instances of actual deception by retail dealers where both kinds of sweets were mixed in one jar and sold as *HACKS* sweets to customers who asked for "red-paper cough sweets". Their evidence is hearsay and has to be ignored. The actual purchasers should have been called to give evidence as regards the actual circumstances of the sales.

For the above reasons I would allow the appeal with costs here and in the Court below and reverse the judgment of the High Court.

Appeal allowed.

Solicitors: *Hilborne, Chung & Co.; Donaldson & Burkinshaw.*

PALANIAPPA CHETTIAR v. ARUNASALAM CHETTIAR

[P.C. (Lord Denning, Lord Devlin and Mr. L. M. D. De Silva) January 31, 1962]

[Privy Council Appeal No. 60 of 1960]

Land — Transfer by father to son to avoid provisions of Rubber Regulations, 1934 — No consideration — Son registered as proprietor — Son refusing to retransfer — Whether deceit on public administration practised by father — Whether son resulting trustee — Whether son express trustee — Presumption of advancement — Defence of deceit on public administration not pleaded — Whether defendant precluded from relying on this defence even though not pleaded.

Contract — Illegal, immoral or fraudulent — Ex Turpi Causa Non Oritur Actio.

In 1934, the plaintiff (hereinafter referred to as the respondent) bought about 40 acres of rubber land. At the time, he already owned 99 acres of rubber land so that with the new purchase, his total holding of rubber land exceeded 100 acres. This was important in connection with the Rubber Regulations (No. 17 of 1934) which made a distinction between holdings of 100 acres and more

and of holdings below 100 acres. If a man held a hundred acres or more the permissible production was assessed by an Assessment Committee. If he held less than 100 acres, it was assessed by the local District Officer.

In order to avoid these regulations, the respondent in 1935 transferred 40 acres of his rubber land to his son, the defendant (hereinafter referred to as the appellant). In the memorandum of transfer the respondent acknowledged receipt of $7,000 as consideration, but it was found as a fact by the trial Judge that no money was paid by the appellant. The transfer was duly registered.

The certificate of title showing the appellant as proprietor of the 40 acres remained in the possession of the respondent all the time. The respondent also received all the income from the property and paid all the wages and assessment. The appellant paid nothing and received nothing in respect of the property.

In 1950, the appellant having refused to execute a power of attorney in respect of the property in favour of the respondent to enable the latter to sell it, the respondent brought an action for a declaration that the appellant held the property in trust for the respondent and for an order for the property to be re-transferred to him.

The trial Judge took the view that the respondent had practised a deceit on the public administration of the country in order to get a personal benefit but held that in view of the Court of Appeal decision in *Sardara Ali* v. *Sarjan Singh* (10) the respondent's possible turpitude was no bar to the success of his claim and he therefore gave judgment for the respondent.

The Court of Appeal disagreed with the trial Judge's interpretation of the decision in *Sardara Ali* v. *Sarjan Singh* (10) but held that there was no evidence that the respondent had practised deceit on the public administration of the country. The trial Judge's decision was affirmed on the ground that the appellant held the property for the respondent as express trustee.

On appeal to the Privy Council,

Held: (1) the trial Judge's finding that the respondent had practised deceit on the public administration of the country to make a personal gain must be upheld. The Board could not agree with the Court of Appeal that there was no evidence for such a finding;

(2) the appellant was not precluded from relying on this defence even though he had not pleaded it and had not appeared at the trial to give evidence on it;

(3) in view of the finding that the respondent had arranged the transfer for an illegal or fraudulent purpose, and as the fraudulent purpose had in fact been carried out, the respondent was precluded from obtaining the aid of the Court.

Cases referred to:—

(1) *Haigh* v. *Kaye* (1872), L.R. 7 Ch. App. 469.
(2) *Shephard* v. *Cartwright*, [1955] A.C. 431.
(3) *Commissioner of Stamp Duties* v. *Byrnes*, [1911] A.C. 386.
(4) *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724.
(5) *Davies* v. *Otty* (1865), 35 Beav. 208.
(6) *Symes* v. *Hughes* (1870), L.R. 9 Eq. 475.
(7) *Petherpermal Chetty* v. *Muniandy Servai* (1908), 24 T.L.R. 462.
(8) *Sajan Singh* v. *Sardara Ali*, [1960] M.L.J. 52; [1960] A.C. 167, 177.
(9) *Kiriri Cotton Co. Ltd.* v. *Dewani*, [1960] A.C. 192.
(10) *Sardara Ali* v. *Sarjan Singh*, [1957] M.L.J. 165.
(11) *Holman* v. *Johnson* (1775), 1 Cowper at p. 343.

PRIVY COUNCIL.

E. F. N. Gratiaen, Q.C. (*Joseph Dean* with him) for the appellant.

William Stabb for the respondent.

The judgment of the Board was delivered by, —

Lord Denning: This is an action brought by a father against his son. It concerns a piece of land in the Mukim of Si Rusa in the State of Negri Sembilan. It is 40 acres 2 roods and 30 poles in extent: and it is cultivated with rubber. The land is registered in the name of the son but the father claims that the son holds it as trustee for him. It is hereinafter called the "40 acres".

The father bought these 40 acres as long ago as 1934. He bought them at a public auction for $8,081.00. But he already owned 99 acres of rubber land. So that if his two holdings were added together his total holding would be 139 acres. This was undesirable from his point of view because of the Rubber Regulations (No. 17 1934). These regulations were passed so as to control the production of rubber. They drew a distinction between holdings of *less* than 100 acres and holdings of *more* than 100 acres. If a man held *more* than 100 acres, the permissible production was assessed by an Assessment Committee. If he held *less* than 100 acres, it was assessed by the local District Officer. In order to avoid these regulations, the father decided to put the 40 acres into his son's name so that his rubber land was ostensibly held by two different persons, neither of whom held a holding exceeding 100 acres. "I had no intention," he said, "of making a present to my son. The sole object was to avoid having to disclose that I held more than 100 acres of rubber land."

Accordingly on 27th February, 1935 the father and son executed a memorandum of transfer whereby the father transferred the 40 acres to the son. In this memorandum the father acknowledged that the son had paid him $7,000 for these 40 acres. But in fact, as the Judge found, the son paid nothing: and this was accepted before their Lordships. On the 8th March, 1935 the transfer was duly registered in the Register of Titles and a certificate of title was in due course issued certifying that the son was the proprietor of the 40 acres. This certificate remained in the father's possession, and he paid all the costs of the transfer.

Ever since the transfer the father has received all the income from the 40 acres and has paid all the wages and assessments. The son has received no part of the income and has paid none of the expenses. There was nothing in writing to account for this. The father said in evidence: "I had no trust deed because it was my own son. My son was 22 years old. He was fully aware of the reason. He knew he held in trust."

In 1950 the father agreed to sell the 40 acres to someone else and asked the son to execute a power of attorney so as to enable him to transfer the land to the purchaser. The son

refused. Whereupon on 21st November, 1950 the father brought this action in the High Court at Seremban against the son claiming that the son was a trustee of the 40 acres holding it on trust for the father. The son resisted the claim. In his defence on 3rd April, 1951 he said (quite wrongly, as the Judge found), that he purchased the land from the father for $7,000 and he counterclaimed for an account of profits from 27th February, 1935 onwards.

It was over 7 years before the action came for trial: and then there was an unfortunate episode. The hearing was fixed for 30th June, 1958. The son had retained leading counsel but he fell ill. The son, by his lawyer and in person, applied for an adjournment but this was refused because it was not a sudden illness and steps should have been taken earlier to secure proper representation. Thereupon both the son's lawyer and the son himself left the Court and the case proceeded in their absence. The son complained of this to the Court of Appeal but they rejected his complaint on this score and it was not pursued before their Lordships. The refusal of an adjournment was essentially a matter within the discretion of the trial Judge and no sufficient ground was shown for upsetting his discretion.

Before their Lordships counsel for the son accepted the facts as given in evidence before the trial Judge and submitted that, on those facts, the father's claim should have been dismissed. Their Lordships have already stated the substance of these facts. The trial Judge (Smith J.) said: "The plaintiff's case had the ring of truth and in the absence of any evidence from the defendant I regard it as probable. If the story of the plaintiff is true, it is quite clear that the plaintiff has practised a deceit on the public administration of the country in order to get a benefit for himself." Their Lordships read this as a distinct finding that the transfer by the father to the son was made for a fraudulent purpose, namely, to deceive the public administration of the country: and that this fraudulent purpose was achieved, in that the holdings were treated by the public authorities as separate holdings each under 100 acres, so that the permissible production of each was assessed by the local District Officer and not by the Assessment Committee. True it is that neither the father nor his manager said in terms that they achieved this result but it was their objective and it may reasonably be inferred that they achieved it. At any rate the trial Judge inferred it. "The plaintiff," he said, "*has* practised a deceit on the public administration." Their Lordships think that this finding should be accepted. They do not find themselves able to agree with the view of the Court of Appeal that there was no evidence to support it.

But can the son now pray in aid this fraudulent purpose? He did not plead it and he did not appear at the trial to give evidence about it. The Court of Appeal thought he could not rely on it. They quoted the words of Sir W. M. James L.J. in *Haigh* v. *Kaye* [1] at page 473: "If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it." The Court of Appeal added: "Here, of course, the defendant has said nothing of the sort."

It appears to their Lordships, however, that there is a clear distinction between *Haigh* v. *Kaye* and the present case. In *Haigh* v. *Kaye* the plaintiff conveyed a freehold estate to the defendant. In the conveyance it was stated that a sum of £850 had been paid by the defendant for it. The plaintiff proved that no such sum was paid and claimed that the defendant was a trustee for him. Now in that case the plaintiff had no reason to disclose any illegality and did not do so. It was the defendant who suggested that the transaction was entered into for a fraudulent purpose. He sought to drag it in without pleading it distinctly and he was not allowed to do so. But in the present case the plaintiff had of necessity to disclose his own illegality to the Court and for this reason: He had not only to get over the fact that the transfer stated that the son paid $7,000 for the land. He had also to get over the presumption of advancement: for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances, see *Shephard* v. *Cartwright* [2] at page 445. The fact that the father received the income does not suffice, see *Commissioner of Stamp Duties* v. *Byrnes* [3]. The father had also to get over this pertinent question: If he intended the son to take as a trustee, why did he not insert on the memorandum of transfer the words "as trustee" and register the trust as he could have done under section 160 of the Land Code?

In these circumstances it was essential for the father to put forward a convincing explanation why the transfer took the form it did: and the explanation that he gave disclosed that he made the transfer for a fraudulent purpose, namely, to deceive the public administration into thinking that he only held 99 acres of land and his son 40 acres, whereas in truth he himself meant to hold the whole 139 acres. Once this disclosure was made by the father, the Courts were bound to take notice of it, even though the son had not pleaded it, see *Scott* v. *Brown, Doering, McNab & Co.* [4].

What then was the effect of this disclosure? If the fraudulent purpose had not been carried out, there might well have been room for repentance and the father might have been allowed to have the land re-transferred to him,

as in the cases to which Mr. Stabb referred such as *Davies* v. *Otty* [5] and *Symes* v. *Hughes* [6], to which might be added *Petherpermal Chetty* v. *Muniandy Servai* [7] where the subject was fully considered by their Lordships' Board. But where the fraudulent purpose has actually been effected by means of the colourable transfer, there is no room for repentance. The father has used the transfer to achieve his deceitful end and cannot go back on it. He cannot use the process of the Courts to get the best of both worlds — to achieve his fraudulent purpose and also to get his property back. The Courts will say: "Let the estate lie where it falls," see *Sajan Singh* v. *Sardara Ali* [8] and *Kiriri Cotton Co. Ltd.* v. *Dewani* [9] at pages 202-3.

Their Lordships notice that the trial Judge (Smith J.) in this case was also the trial Judge in *Sajan Singh* v. *Sardara Ali, supra.* In that case he had applied the maxim *"ex turpi causa non oritur actio"*: but having been over-ruled by the Court of Appeal, he felt that in the present case he ought not to apply the maxim. He said: "In view, however, of the Court of Appeal decision in *Sardara Ali* v. *Sarjan Singh* [10], it appears that the plaintiff's possible turpitude is no reason for denying him the orders which he seeks." The difference, however, is this: In *Sardara Ali* v. *Sarjan Singh* the plaintiff founded his claim on his right of property in the lorry and his possession of it. He did not have to found his cause of action on an immoral or illegal act. He was held entitled to recover. But in the present case the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by Lord Mansfield, "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act," see *Holman* v. *Johnson* [11] at page 343. Their Lordships are of opinion that the Courts should not lend their aid to the father to obtain a re-transfer from the son.

Their Lordships will therefore report to the Head of the Federation as their opinion that the appeal should be allowed and the orders of the Court of Appeal and the High Court set aside. The claim of the respondent (the plaintiff in the action) should be dismissed. The counterclaim should also be dismissed. The respondent should pay the costs before their Lordships and in the Court of Appeal from the date of the additional grounds of appeal of 11th November, 1958, but there should be no order as to the costs before that date.

Appeal allowed.

Solicitors: *Graham Page & Co.; Lawrence, Messer & Co.*

LEE CHING POH v. CHING KEE SUN & ORS., TRUSTEES OF YEUNG CHING SCHOOL

[A.C.J. (Ambrose J.) February 3, 1962]

[Singapore — District Court Appeal No. 31 of 1961]

Landlord and Tenant — Claim for possession — Whether reasonable — Alternative accommodation — Whether suitable — District Judge calling for Certificate of City Architect despite objection by counsel — Whether production of certificate may be imposed as a condition under s.18 of the Control of Rent Ordinance (Cap. 242).

Evidence — Calling of witness in civil action — Additional evidence in the form of Architect's certificate.

This was an appeal from a judgment of the District Court giving the respondents possession of the front portion of the 1st floor of No. 72 Club Street, Singapore. The main grounds of appeal were that the District Judge was wrong in law in holding that it was reasonable for the respondents to require possession; and that he was wrong in law and in fact in holding that the alternative accommodation offered was suitable.

Held: (1) it was reasonable in this case for the respondents to require possession;

(2) a Judge has no power to call a witness in a civil action without the consent of both parties; to call for additional evidence in the form of a certificate by the City Architect is virtually the same as calling him as a witness;

(3) the District Judge has no power under section 18 of the Control of Rent Ordinance to impose a condition on the respondents which would in effect amount to calling for additional evidence without the consent of both parties;

(4) there was sufficient evidence to justify the finding that the alternative accommodation was suitable.

Case referred to:—

(1) *In re Enoch and Zaretsky, Bock & Co.'s Arbitration,* [1910] 1 K.B. 327.

DISTRICT COURT APPEAL.

N. N. Leicester for the appellant.

Tan Peng Khoo for the respondents.

Cur. Adv. Vult.

Ambrose J.: This is an appeal by the defendant from a judgment of the District Court giving the plaintiffs possession of the front portion of the first floor of a house known as No. 72 Club Street, Singapore, under section 15(1)(*l*) of the Control of Rent Ordinance.

This provision of the Ordinance empowers the Court to give judgment for possession "where the court considers it reasonable that such..... judgment be ..... given and is satisfied that suitable alternative accommodation is available for the tenant ....."

The learned District Judge found that it was reasonable that an order should be made giving the plaintiffs possession of the premises. He said:

"On the evidence before me I came to the conclusion that it was eminently reasonable for the plaintiffs to require possession. They require possession to complete the building programme of the school to provide an